

Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

From: Galena West, Counsel, Legal Division
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Date: July 26, 2004

Subject: Adoption of Amendments to Regulation 18401 (Required Recordkeeping for Chapter 4) and Regulation 18421.1 (Disclosure of the Making and Receipt of Contributions)

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I. Executive Summary

In recent years, changes in technology have provided candidates and committees with the ability to receive contributions via wire transfer, credit card, debit account transactions, and other similar electronic means. Although Commission staff has advised that electronic contributions are allowed under the Political Reform Act (the “Act”)¹ and are “received” upon authorization by the contributor, this guidance has primarily been provided through advice letters and the campaign disclosure manuals.

In order to clarify and formalize the rules regarding recordkeeping and disclosure of electronic contributions, staff recommends the Commission adopt the proposed amendments to regulations 18401 and 18421.1. Amended regulation 18401 outlines which records must be retained for a contribution made through electronic means; and amended regulation 18421.1 addresses when an electronic contribution is “made” or “received.”

II. Background

A. Current Advice

As technology has emerged to support the making and receipt of contributions via electronic means, candidates and committees have sought advice regarding the permissibility of electronic contributions. These requests have primarily questioned whether, and under what circumstances, a committee may receive electronic contributions and what records should be kept to document these transactions.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

In general, Commission advice letters and campaign disclosure manuals have affirmed that electronic contributions are permissible under the Act, provided that the Act's disclosure and recordkeeping requirements are met. Staff advice has also specified that an electronic contribution made via credit card is "received" on the date the transaction is authorized by the contributor; and an electronic contribution made via wire transfer is "received" on the date the funds are received by the committee's bank.

Additional information regarding current Commission advice and the results of interviews conducted with several treasurers can be found in the Pre-notice Discussion of Amendments to Required Recordkeeping for Chapter 4 – Regulation 18401 and Disclosure of the Making and Receipt of Contributions – Regulation 18421.1 memorandum ("Pre-notice Memorandum") presented at the June Commission meeting.²

B. Current Rules and Regulations

Section 82015 of the Act defines a "contribution" as a payment received by a candidate or committee for which the candidate or committee has not provided full and adequate consideration in return, unless it is clear that the payment was not made for political purposes. An expenditure made at the behest of a candidate or committee is also considered a contribution, unless full and adequate consideration is received in return or unless it is clear that the payment was not made for political purposes.

Under the Act, committees are required to file periodic reports disclosing contributions received and expenditures made for the purpose of supporting or opposing state and local candidates and ballot measures. Section 84211 specifies the information that a committee must disclose for each person who contributes a cumulative amount of \$100 or more. This information includes the contributor's name, address, and occupation, as well as the date and amount of contributions received during the reporting period and the cumulative amount received during the current calendar year.

In support of these disclosure requirements, regulation 18421.1 states the rules for determining when a contribution is "made" or "received." Section 84104 sets forth recordkeeping provisions which require "each candidate, treasurer and elected officer to maintain such detailed accounts, records, bills and receipts that are necessary to prepare campaign statements and to comply with the provisions of this chapter...." Regulation 18401 outlines the detailed information and original source documentation that committees must maintain. The regulation separates categories of required documents by the amount of the contribution or expenditure and as the amount of a contribution or expenditure increases, so do the recordkeeping requirements.

² In general, the treasurer interviews revealed that electronic contributions are made through a variety of mechanisms (on-line, over the phone, via paper contributor card, etc.). These interviews also found that treasurers use a different standard for determining when an electronic contribution is "received" and keep a variety of source documents to comply with the disclosure and recordkeeping provisions of the Act.

III. Discussion and Proposed Regulatory Action

Staff proposes that the Commission adopt amendments to regulations 18401 and 18421.1 which will identify what records must be kept to satisfy the recordkeeping requirements of the Act and will establish standards for when an electronic contribution is “made” or “received.”

A. Proposed Amendments to Regulation 18401

As stated above, regulation 18401 outlines the records that must be maintained in order to comply with the recordkeeping rules of Chapter 4 of the Act. The proposed amendment to regulation 18401 adds language to subdivision (a)(2)(B) which will encompass all electronic methods that may be used to make an electronic contribution and will specify the original source documentation required for electronic contributions of \$25 or more.³ This language remains unchanged from that presented at the June pre-notice meeting.

The amended language presents a new category of contributions which includes those made by wire transfer, credit card or debit account transaction, and “similar electronic payment option.” This category of transactions also includes contributions made via the Internet or telephone. This list provides specific examples for ease of application and also uses a catch-all phrase of “similar electronic payment option” to include any other payment method not specified in the regulation.

The original source documentation required for electronic contributions will include, specifically, any credit card receipts, transactions slips, credit card vouchers and any writing signed by the contributor. General language will also mandate retention of any “other documentation of credit card transactions, including credit card confirmation numbers and itemized transaction reports, as well as any other information collected when debiting the contributor’s account.” This category of records was purposefully left broad to capture any additional information regarding these contributions.

As identified in advice letters and interviews with treasurers, the technology for payment methods and authorization practices is constantly evolving. Staff believes that a compromise between the general and the specific has been reached with the amended language for regulation 18401 and regulation 18421.1 (discussed below). While specific examples of payment methods for electronic contributions and source documentation provide guidance as to which records must be kept, the general catch-all language provides a safeguard that addresses differing methods of payment and accounting.

B. Proposed Amendments to Regulation 18421.1

Regulation 18421.1 states the rules for determining when a contribution is “made” or “received” for the purposes of the campaign disclosure provisions of the Act. Although the rules for contributions in the form of a check or similar payment method are clear, current regulatory language does not specifically address electronic contributions, such as credit card contributions

³ These requirements will also be applicable to contributions of \$100 or more since each subdivision incorporates the requirements of the previous subdivision.

made via the Internet. The proposed amendments to regulation 18421.1 would establish standards for when electronic contributions are “made” and “received.”

Subdivisions (a) - (d) – Disclosure of the “Making” of Contributions and “Receipt” of Non-electronic Contributions

In order to clarify that the standard for determining when an electronic contribution is “made” is the same as when a non-electronic contribution is “made,” subdivision (a) has been modified to explicitly include contributions made through wire transfer, credit card, debit card and similar electronic payment options. This language remains unchanged from that presented at the June pre-notice meeting and includes other minor clarifying changes to subdivisions (a) - (d).

Subdivision (e) – Disclosure of the “Receipt” of Electronic Contributions

Although current advice states that an electronic contribution is “received” upon authorization by the contributor, applying current advice to some electronic contribution methods could cause reporting violations for committees. For example, suppose that a contributor completes an on-line form and authorizes the transaction. Although the committee has by definition “received” the contribution, it may not receive notification of the contribution until a later time and may fail to disclose the contribution within the required time frame. The possibility of inadvertent reporting violations could be especially significant during the shortened timelines of the late contribution reporting period and in the instance of returning an above-the-limit contribution.⁴

In addition, it should be noted that current advice for electronic contributions varies from the rules used to determine receipt of *non-electronic* contributions. For checks and the like, the standard for “receiving” a contribution is possession or control of the check itself.⁵ For contributions collected by payroll deductions or dues by a membership organization for its sponsored committee, the standard is based on the earlier of the following: the date the committee obtains actual possession or control of the contribution or within 60 days after receipt of the payment by the committee’s sponsor.

In an effort to avoid inadvertent reporting violations and for consistency with existing rules, staff recommends that the “received” standard for electronic contributions be based on a rule of “possession or control.” In the language discussed at the June meeting, staff proposed that an electronic contribution be considered “received” when a candidate or committee obtains possession or control of the payment information or funds, whichever is earlier.

⁴ During the late contribution periods, committees must report a contribution within 24 hours of receipt, with only 24 hours in which to return a late contribution which is not cashed, negotiated, or deposited. (Section 84203(b) and (c).) For purposes of contribution limits, contributions accepted in excess of the limits must be returned prior to deposit or negotiation within 14 days of receipt. (Regulation 18531(b).)

⁵ Additionally, the regulation also uses the standard of possession or control for determining when non-monetary contributions are made or received. (Proposed regulation 18421.1(f).)

During pre-notice discussion, Commissioner Blair raised the concern that the proposed language could allow a committee to delay their review of an on-line payment notification and postpone reporting. For example, if a committee received an e-mail notification of a pending contribution, it could elect to wait to sign on to its account and “discover” the transaction at a later time. Because the committee had not opened the notification or authorized processing of the contribution, it could be argued that the committee had not “received” the contribution. In order to address this concern, subdivision (e) has been amended to specify that an electronic contribution will be received:

“[O]n the date the candidate or committee, **or the agent of the candidate or committee**, obtains possession or **has** control of the debit/credit account information or other payment information by which the contribution is made, or on the date the candidate or committee, **or the agent of the candidate or committee**, obtains possession or **has** control of the funds, whichever is earlier.”
(Emphasis added.)

In the above scenario, the committee’s ability to postpone review would indicate the committee controls the payment information; and thus the contribution would be “received.” This interpretation is consistent with current treatment of contributions made by check and mailed to a committee. Just as a committee “has control” of the payment information when the check is in the committee’s mailbox, a committee “has control” once the information is in their computerized in-box. If a committee decides not to retrieve its mail, it “has control” of the contribution by using its own discretion to leave it in the committee’s mailbox. A purposeful delay in reviewing this information and reporting the contribution could be considered a violation of the Act.

This proposed standard of possession or control of either the payment information or the funds is intended to address the variety of methods by which an electronic contribution may be made and received. The following list provides examples of how the proposed regulation will apply to a committee’s receipt of an electronic contribution.

- If a contributor telephones a contribution into a committee, the committee “receives” the contribution on the date the contributor gives his or her debit/credit account information to the committee (the date the committee obtains possession of the payment information).
- If a contributor makes a contribution via the Internet and the committee reviews the on-line transaction before the contribution is processed, the committee “receives” the contribution once it has control of the payment information (the date the payment information is received by the committee).
- If a contributor makes a contribution via the Internet and the committee allows direct deposit of the contribution without any review, the contribution is “received” when the committee has possession or control of the funds (assuming this date is earlier than receipt of the payment information).

The language of subdivision (e) has also been modified to include the “agent of the candidate or committee” language used in subdivision (c). This language ensures that an electronic contribution processed by an entity other than the committee, such as an Internet company or 900-number provider, is “received” on the date that the agent receives the payment information or funds.

V. Recommendations

Staff recommends that the Commission adopt proposed amendments to regulations 18401 and 18421.1 in order to provide unambiguous rules for recordkeeping and disclosure of electronic contributions. Staff recommends adopting amendments to regulation 18401 as proposed to outline which records must be retained for a contribution made through electronic means. Staff also recommends adoption of the proposed amendments to regulation 18421.1, which would primarily add subdivision (e), to clarify the “received” standard for an electronic contribution.

Attachments:

Appendix A – Proposed Amendments to Regulation 18401

Appendix B – Proposed Amendments to Regulation 18421.1